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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

JUN 15 1998

Federal Communications Commission  
Office of Secretary

In re Applications of	)	MM Docket No. 90-638
	)	
HEIDI DAMSKY	)	File No. BPH-880816MW
	)	
WEDA, LTD.	)	File No. BPH-880816NR
	)	
HOMEWOOD PARTNERS, INC.	)	File No. BPH-880816NU
	)	
For Construction Permit for a	)	
New FM Station on Channel 247A	)	
in Homewood, Alabama	)	

To: The Commission

**CONSOLIDATED OPPOSITION TO PETITION FOR  
RECONSIDERATION AND REQUEST FOR STAY**

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Dated: June 15, 1998

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## SUMMARY

Homewood Radio Co., L.L.C. ("HRC") hereby opposes the Petition for Reconsideration and the Emergency Request for Stay filed by Heidi Damsky ("Damsky"). There is no basis for grant of the requested relief in either the Petition or the Stay Request. Damsky's Petition is procedurally defective in that she waived the ability to raise the antitrust allegations that she made by not raising them when she opposed the Joint Request in September 1997. Further, there is no substance to the allegations. Finally, in the Stay Request, Damsky fails to meet the Commission's strict test for grant of such an extraordinary remedy. The Commission should expeditiously dispose of both the Petition and the Stay Request.

1. The Petition is procedurally defective. It consists of a rehash of arguments about Damsky's qualifications previously denied by the Commission, as well as antitrust allegations against Cox Radio, Inc., with whom HRC will be entering into an LMA for HRC's station. This relationship was disclosed by HRC and acknowledged by the Commission. Damsky is too late in raising this issue.

2. There is no merit to the antitrust allegations raised by Damsky. As set forth, her factual premises are in error. Further, her allegations that the proposed HRC/Cox LMA will result in violations of the antitrust laws because it will result in too great a market share for Cox are incorrect. The Department of Justice has approved numerous transactions involving equal or greater market shares.

3. Damsky utterly fails the test for a stay set forth in Virginia Petroleum Jobbers Ass'n v. F.P.C., 259 F.2d 921 (D.C. Cir. 1958). She cannot show likelihood of success on the merits, much less no harm to the public interest. Further, she has an adequate remedy at law.

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The Commission should summarily dispose of the Petition for Reconsideration and the Emergency Request for Stay.

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To: The Commission

**CONSOLIDATED OPPOSITION TO PETITION FOR  
RECONSIDERATION AND REQUEST FOR STAY**

HOMEWOOD RADIO CO., L.L.C. ("HRC"),<sup>1/</sup> pursuant to Section 1.106(g) of the Commission's Rules, 47 C.F.R. § 1.106(g), hereby opposes the Petition for Reconsideration filed May 22, 1998 (the "Petition") by Heidi Damsky ("Damsky").<sup>2/</sup> In addition, HRC simultaneously opposes the Request for Stay, filed June 1, 1998 (the "Stay Request") by Damsky. 47 C.F.R. § 1.45(a). There is no basis for grant of the requested relief in either the Petition or the Stay Request. Damsky's Petition is procedurally defective in that she waived the ability to raise the antitrust allegations that she made by not raising them when she opposed the Joint Request in September

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<sup>1/</sup> By Memorandum Opinion and Order, 13 FCC Rcd \_\_\_\_ (1998) (FCC 98-81, released May 6, 1998) (the "Commission's Order"), the Commission granted the Joint Request for Approval of Settlement (the "Joint Request") and (1) approved the merger of Homewood Partners, Inc. ("Partners") and WEDA, Ltd. ("WEDA") into HRC and (2) granted the application of WEDA, as amended, in the name of HRC.

<sup>2/</sup> HRC's Opposition is timely filed. On June 3, 1998, HRC filed a Consent Motion for Extension of Time in order to file today, June 15, 1998.

1997. Further, there is no substance to the allegations. Finally, in the Stay Request, Damsky fails to meet the Commission's strict test for grant of such an extraordinary remedy. The Commission should expeditiously dispose of both the Petition and the Stay Request.

**A. The Petition Is Procedurally Defective  
And Should Be Dismissed Without Further Consideration**

1. It is well settled that the Commission will not grant reconsideration of matters that it has already considered. Beth Knight, 8 FCC Rcd 3543 (¶ 2) (1993); F.E.M. Ray, Inc., 7 FCC Rcd 4606 (¶ 3) (1992), *citing* WWIZ, Inc., 37 FCC 685 (1965), *aff'd sub nom. Lorain Journal Co. v. F.C.C.*, 351 F.2d 824 (D.C. Cir. 1965; Eugene Walton, 7 FCC Rcd 6038 (1992). *See also*, Eagle Broadcasting Co. v. F.C.C., 514 F.2d 852 (D.C. Cir. 1975) (Commission may refuse petition that is "frivolous, and when the request for rehearing is only a rehash of the same frivolous arguments..." 514 F.2d at 855). The Petition clearly and utterly fails the Commission's procedural prerequisites for reconsideration. On this basis alone, the Commission can and should dismiss Damsky's Petition.

2. Damsky questions the Commission's Order insofar as it affirmed the Initial Decision's conclusion that Damsky was financially disqualified. (Petition, p. 2). Just as she failed to do in her Opposition to the Joint Request, she has failed to make any citation to specific evidence in the record that supports her position.<sup>3/</sup> She merely

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<sup>3/</sup> Actually, the Commission found independent bases upon which to conclude that Damsky was financially unqualified. Damsky made no serious and reasonable attempt to ascertain costs to construct and operate the Homewood station. (Commission Decision, ¶ 30). The  
(continued...)

repeats her previous assertion that the Commission's decision in Gonzalez Broadcasting, Inc. 12 FCC Rcd 12253 (1997) somehow does not provide a basis for approval of the Joint Request. (Petition, p. 2). Similarly, she repeats her claims that the Commission incorrectly concluded that Partners was qualified. (Petition, pp. 2-3).<sup>4/</sup> All these arguments constitute precisely the kind of repetitious arguments prohibited by the Commission's Rules. The Commission should promptly dismiss the Petition. Beth Knight, supra.

3. Damsky's other argument made in the Petition is that the proposed operation of HRC's station by Cox Radio, Inc. ("Cox") on a time brokerage basis will violate the antitrust laws (Petition, p. 3-6). This argument, too, is procedurally defective and requires summary dismissal by the Commission.

4. The Commission has consistently held that where it denies an application for review, it will not grant reconsideration unless a petitioning party presents newly discovered evidence or facts that have come to light since the last opportunity for presenting such evidence to the Commission. 47 C.F.R. § 1.106(b)(2)(i) and (ii). See

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<sup>3/</sup>(...continued)

Petition conveniently glosses over this fact. The Commission Decision also concluded that Damsky did not have any funds committed to the project (even assuming *arguendo* she had any real idea of the magnitude of the commitment necessary). (Commission Decision, ¶¶ 31-32). Having failed to establish either a reasonable estimate of costs or a commitment of funds, Damsky could not try to resurrect her financial showing at hearing. (Commission Decision, ¶ 30, 32), citing Aspen FM, Inc.

<sup>4/</sup> With the rhetorical overkill so typical of Damsky's filings throughout this case, the Petition also makes the gratuitous observation that Partners' principals are "intelligent and adept liars." (Petition, p. 3). In disposing of this Petition, the Commission should make clear that its pleading rules do not countenance such *ad hominem* attacks and "cheap shots."

also Eugene Walton, 7 FCC Rcd 6038 (1992). In this case, the Commission's Order did not deny an application for review of a decision by a delegated authority; the Commission's Order was a decision on the merits by the full Commission. However, having had a full opportunity to present its objections to the Joint Request and having had a full review on the merits by the Commission, HRC and Cox, Damsky should not now be afforded a "second bite at the apple."

5. The premise of Damsky's antitrust argument, which is founded on facts available or known to Damsky at the time that she opposed the Joint Request, is that Cox will operate HRC's station pursuant to a time brokerage arrangement ("LMA") and that this information had not previously been brought to the Commission's attention. (Petition, p. 3). This is patently false. In the Joint Request, filed September 12, 1997, WEDA and Partners specifically disclosed their plan to enter into an LMA with Cox and that Cox had an option to acquire the Homewood station from HRC. (Joint Request, p. 3, ¶¶ 6-7). The Commission's Order specifically recites that the Commission was aware of this arrangement and approved it as acceptable under Commission rule and precedent. (Order, ¶¶ 5, 7, 11). The information about this proposed LMA arrangement and the ownership and LMA arrangements for other stations by Cox was publicly available to Damsky in September 1997 when she opposed the Joint Request and she failed to raise it then. The Commission must conclude that Damsky has waived the opportunity to make any antitrust allegation for failure to raise it in a timely manner. 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(b)(3). Accordingly, the Commission should summarily dismiss the Petition.



**B. There Is No Legal Basis For Damsky's Antitrust Allegations**

6. Damsky's argument that Cox will be in violation of the antitrust laws rests on three points, each of which is wrong: (1) she inaccurately says that in 1997 the Department of Justice's Antitrust Division ("DOJ") required Cox to sell a Birmingham radio station to avoid a potential antitrust violation; (2) she wrongly asserts that DOJ has established a "40% threshold" where an acquisition producing a radio revenue share in excess of that level is a "prima facie" violation of the Sherman and Clayton Acts; and (3) she erroneously claims that Cox's role in the creation and operation of a new FM radio station will somehow increase Cox's "dominance" of the market, when, in fact, the addition of a new station actually increases capacity, expands listener choice, and puts downward pressure on advertising rates.

7. First, relying on an inaccurate newspaper report,<sup>5/</sup> Damsky completely misconstrues the facts surrounding Cox's 1997 Birmingham transactions. DOJ never "required" Cox to sell any Birmingham radio station, and in fact DOJ did not open an investigation of the transactions.<sup>6/</sup> What Cox did in 1997 was acquire contract rights for four radio stations: WENN-FM and WAGG-AM from BTW Broadcasting, and WBHK-FM

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<sup>5/</sup> The Commission has previously ruled that a newspaper article does not constitute proper evidentiary support for Commission inquiry. See generally Storer Communications, Inc., 61 Rad. Reg. (P&F) 2d 454, 456 (Video Serv. Div. 1986) (information in newspaper article not acceptable substitute for knowledge required by Section 309(d)).

<sup>6/</sup> The Cox/H&P Radio transaction involving stations WBHK-FM and WBHJ-FM was the subject of a Hart-Scott-Rodino filing made on July 3, 1997; early termination of the waiting period, which occurs in cases where the antitrust enforcement agencies have determined that the transaction presents no antitrust issue, was granted on July 16, 1997. See Declaration of Timothy J. O'Rourke, which is Attachment 1 hereto, at p. 1.

and WBHJ-FM from H&P Radio. Prior to any filings (or other contact) with DOJ, Cox decided to assign its contract for the purchase of WENN-FM, and retain the other three stations. At no point did Cox ever explore with DOJ or seek DOJ approval for owning all four radio properties.<sup>77</sup>

8. Second, Damsky is simply wrong in claiming that a radio revenue share in excess of 40% is, in DOJ's view, a "prima facie" violation of the Sherman or Clayton Acts. Even assuming that Damsky has correctly interpreted the Consent Decree in the Rochester, New York case, since that time DOJ has approved in numerous instances market shares in excess of 40%. The record is clear that DOJ has reviewed and passed on many radio transactions in which the acquiring company's post-merger share of radio revenues significantly exceeded 40%. Examples of such transactions include the following: Jacor/Citicasters in Cincinnati (DOJ approved through a consent decree a post-divestiture share of 48.1%); Citadel/Crescent in Albuquerque (post-merger share of 57%); Jacor/Noble Best in Denver (post-merger share of 45.7%); Connoisseur/Majac in Flint (post-merger share of 47.2%); ARS/Chase in Hartford (post-merger share of 50.8%); Patterson/Henry in Honolulu (post-merger share of 50.7%); SFX/Chancellor in Jacksonville (post-merger share of 45.4%); Clear Channel/Radio Equity in Oklahoma City (post-merger share of 47.4%); and Clear Channel/Triathlon, US Radio in Little Rock (post-merger share of 44.1%). Indeed, just this month DOJ approved a

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<sup>77</sup> Cox made a unilateral determination that the DOJ review process would be expedited by assigning the rights to WENN-FM to a third party, but even then, that decision was made based on format, not revenue share, considerations. See Declaration of Timothy J. O'Rourke, which is Attachment 1 hereto, p. 2.

transaction whereby Capstar would acquire station KRNA-FM in the Cedar Rapids market, a transaction which based on 1997 BIA data gives Capstar control of 45% of the radio revenue in the market.<sup>8/</sup>

9. Even more importantly, the HRC/Cox LMA does not change or increase Cox's existing share of Birmingham radio revenue (42% based on BIA data for 1997), nor does the LMA remove any existing competitor in the market. The HRC/Cox LMA brings a new station to the market; there is no radio station currently operating on Channel 247A, so, even if the LMA is regarded as the functional equivalent of a merger, the HRC/Cox LMA would be viewed as a non-horizontal merger under the DOJ Guidelines. See DOJ 1984 Merger Guidelines §4.0, 49 Fed. Reg. 26823, 26834 ("non-horizontal mergers involve firms that do not operate in the same market.") Such mergers, as would be true here, "produce no immediate change in the level of concentration in any relevant market," and are "less likely" to give rise to competitive concerns. Id. An LMA involving a start-up Class A station -- which by definition has no commercial history, revenues, or audience base -- cannot possibly pose an antitrust issue, particularly when Cox's existing market share (unchanged by the LMA) is lower than levels DOJ has passed upon for horizontal acquisitions.<sup>9/</sup>

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<sup>8/</sup> Capstar agreed not to purchase a second Cedar Rapids station; had both stations been acquired Capstar would have controlled 49% of radio revenues. See DOJ Press Release (June 8, 1998).

<sup>9/</sup> In addition, DOJ has indicated in court that Class A signals are not as competitively significant as "full market" signals, see United States v. American Radio Systems Corp., No. CA97-405 (D.D.C), Tr. of Hearing at 7-10 (July 23, 1997), further substantiating the lack of any competitive issue arising from the LMA involved here.

10. Finally, Damsky's complaint that the HRC/Cox LMA will somehow "increase Cox's dominance" of radio broadcasting in Birmingham simply makes no sense. Cox is within the Commission's ownership limits for the market. 47 C.F.R. §73.3555(a)(1). Further, as noted above, an LMA with a station that is not presently in the market cannot "increase" any Cox market share. To the contrary, what the transaction does is bring another station to the market -- the market-wide inventory of advertising spots is expanded, and a new format is introduced, giving listeners more choices and advertisers more options to play off against existing stations. The LMA in short expands and increases capacity. It is a matter of fundamental economics that such a situation, in turn, yields more choices for consumers and points to lower prices for advertisers. Those are, of course, manifestly pro-competitive outcomes.

11. The HRC/Cox LMA presents no antitrust issue. Accordingly, the Commission should deny the Petition insofar as it argues otherwise. Dubuque TV Ltd. Partnership, 4 FCC Rcd 1999 (1989) (Commission dismisses unsubstantiated allegations of antitrust violations).

**C. Damsky Has Failed To Meet The  
Strict Criteria For Grant Of A Stay of the Commission's Order**

12. There is no basis for grant of a stay of the Commission's Order, as requested by Damsky. She correctly cites to Virginia Petroleum Jobbers Ass'n v. F.P.C., 259 F.2d 921 (D.C. Cir. 1958). As Damsky has conceded, a party seeking a stay must:

- a. The moving party has a strong likelihood that it will prevail on the merits of its appeal;

- b. The party seeking the stay will be irreparably injured without the stay;
- c. The issuance of the stay will not substantially harm other interested parties; and
- d. The grant of the stay is in the public interest.

Id. Damsky clearly fails this test.

13. For the reasons outlined in Section B above, Damsky cannot demonstrate any likelihood of success on the merits of her appeal, much less an overwhelming likelihood of one. She is simply wrong in her interpretation of the antitrust law and its applicability to the facts in this situation. Anticipating this potentially terminal debility in her Stay Request, Damsky seeks to rely on the alternative holding of the D.C. Circuit in Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). Damsky claims that the WMATA court "modified the Virginia Petroleum test to provide that even in cases where an appellant is 'less likely than not to prevail on the merits,' a stay can still be issued and should be issued where there are other factors requiring a stay." (Stay Request, p. 2). Damsky is clearly wrong in her interpretation. Contrary to Damsky's interpretation of the WMATA case is the case itself, where the Court held that a stay could only be granted, even without a showing of mathematical probability that the party will prevail on the merits, provided that the moving party otherwise meets all the other Virginia Petroleum factors not just "other factors", as Damsky would have it (Stay Request, p. 2). As the Court noted:

An order maintaining the *status quo* is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable

harm on the movant.

Washington Metro. Area Transit Comm'n v. Holiday Tours, *supra*, 559 F.2d at 844. In other words, even assuming that Damsky had presented serious questions involving the antitrust laws, which she has demonstrably not done, *see* Section B, Damsky would have had to meet all three other prongs of the test. And Damsky clearly fails the public interest and irreparable injury tests.

14. Damsky has not demonstrated an irreparable injury. A premise of such relief is the absence of a legal remedy. If Damsky were to prevail, either through her Petition or in any subsequent review of a denial of her application before the D.C. Circuit, 47 U.S.C. § 402(b), the Commission would be obligated to grant relief ordered by the Court. Thus, Damsky cannot show an irreparable injury because she does not lack an adequate legal remedy. *See Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985).

15. On the basis of the public interest factor, the equities weigh decisively against granting a stay. The public interest is served by inauguration of the first transmission service licensed to Homewood. This was implicit in the decision to make the allocation more than 10 years ago. Delay in the initiation of service, which would result from a grant of the stay, harms the public interest. The grant of HRC's construction permit, as well as any decision to build the station and begin operation of it, is subject to whatever risk is associated with an appeal by Damsky. However, that does not diminish the public interest in having additional radio service as soon as possible. The Commission has previously been cautioned about minimizing the

importance of service to the public and taking actions that would result in disruption of radio service, even in the context of contested licensing cases. Orion Communications, Ltd. v. F.C.C., 1997 U.S. App. LEXIS 35675 (D.C. Cir. 1997). Thus, it is evident that the public interest would not be served by the grant of the Stay Request.

16. Accordingly, the Commission must conclude that Damsky has failed to meet the strict test for grant of a stay. Damsky clearly fails at least three prongs of the Virginia Petroleum test. The Commission should deny the Stay Request.

#### **D. Conclusion**

17. Damsky's Petition is clearly defective. Even assuming arguendo that she had presented valid questions of antitrust law, Damsky long ago waived the right to raise those issues. Insofar as the Petition otherwise reargues the bases upon which the Commission previously set aside her objections to the Joint Request, it is similarly procedurally defective and subject to summary dismissal.

18. Even if the Commission proceeds to review the substance of Damsky's Petition, it must conclude that there is "no there there." Damsky has incorrectly stated the applicable antitrust law and is wrong in her conclusions about market share. This provides the Commission an alternate basis for denial of the Petition.

19. Finally, Damsky has failed to demonstrate that the Commission should stay the effectiveness of the Commission's Order approving the Joint Request, denying the Damsky application and granting the HRC application. The Commission should deny the Stay Request.

**WHEREFORE**, in light of the foregoing, HRC respectfully requests that the Commission dismiss or deny the Petition and deny the Stay Request.

Respectfully submitted,

**HOMEWOOD RADIO CO., L.L.C.**

By: 

Stephen Diaz Gavin

**PATTON BOGGS, L.L.P.**

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Its Counsel

Dated: June 15, 1998

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**ATTACHMENT NO. 1**

**Declaration of Timothy J. O'Rourke**

**DECLARATION UNDER PENALTY OF PERJURY**

I, Timothy J. O'Rourke, hereby state under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am a member of the law firm of Dow, Lohnes & Albertson, P.L.L.C., Washington, D.C. I represent Cox Radio, Inc. ("Cox") on matters related to antitrust law.

2. I am an experienced professional in the field of antitrust law. In addition, from 1992 until 1993, I served as a Counselor to the Assistant Attorney General, Civil Division, and later as a Deputy Assistant Attorney General in the Civil Division, United States Department of Justice.

3. I have reviewed the Petition for Reconsideration filed by Heidi Damsky ("Damsky") in the Homewood, Alabama proceeding, and specifically the allegations about antitrust law issues as they relate to Cox.

4. I have personal knowledge of certain matters raised in Damsky's Petition. The Cox/H&P Radio transaction involving stations WBHK-FM and WBHJ-FM was the subject of a Hart-Scott-Rodino filing that was made on July 3, 1997. Early termination of the waiting period was granted on July 16, 1987, which occurs in cases where the antitrust enforcement agencies have determined that the transaction presents no antitrust issue.

5. I also have personal knowledge of matters related to Cox's acquisition and subsequent sale of WENN-FM to Dick Broadcasting. Prior to any contact with DOJ,

Cox made a unilateral determination that the DOJ review process for Cox's Birmingham transactions would be expedited by assigning the rights to WENN-FM to a third party. Cox's decision to sell WENN-FM was made based on format, not revenue share, considerations, and was not required or mandated by DOJ.

6. I have reviewed the Consolidated Opposition to Petition for Reconsideration and Request for Stay being filed by Homewood Radio Company, L.L.C. in opposition to Damsky's Petition. The factual matters set forth regarding Cox in the Consolidated Opposition are true and correct to the best of my knowledge.

Dated: June 15, 1998

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Timothy J. O'Rourke

**CERTIFICATE OF SERVICE**

I, Lisa Y. Taylor, a secretary in the law firm of Patton Boggs, L.L.P., do hereby certify that a copy of the foregoing "**CONSOLIDATED OPPOSITION TO PETITION FOR RECONSIDERATION AND REQUEST FOR STAY**" has been sent via U.S. Mail, First-Class postage prepaid, this 15th day of June, 1998 to the following:

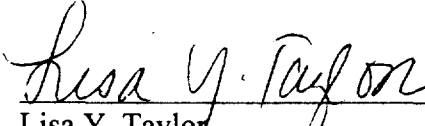
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\_\_\_\_\_  
Lisa Y. Taylor

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**\* HAND DELIVERED**